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No. 08-668

In the
Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been a sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner Charles A. Pratt Construction Co., Inc.'s, petition for writ of certiorari.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of property rights, having participated as lead or amicus counsel in several takings cases before this Court. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF and its supporters have an interest in the constitutional issues raised in this case. PLF seeks to underscore the need for this Court to address how the lower courts should apply the regulatory takings test

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

articulated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), along with the "final agency decision" prong of the ripeness test articulated in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

SUMMARY OF ARGUMENT

This case represents the latest casualty of a confused takings jurisprudence. Petitioner labored for years finally to obtain county approval for one of ten alternative uses of its property. When the county's approval was appealed by a project opponent, Respondent California Coastal Commission declared, as the court of appeal aptly put it, "the vast bulk" (over 80%) of Petitioner's property to be *undevelopable* environmentally sensitive habitat area. *Charles A. Pratt Constr. Co., Inc. v. California Coastal Comm'n*, 162 Cal. App. 4th 1068 (2008).

The court of appeal nevertheless rejected Petitioner's *Penn Central* claim as unripe and without merit *as a matter of law*. *Id.* at 1080-83. In other words, Petitioner could not try his *Penn Central* claim on evidence presented before a fact-finding judge or jury.

The petition raises several important constitutional issues relating to the Takings Clause of the United States Constitution. Because of the confusion and contradictions that currently plague regulatory takings law, and its impact on countless property owners across the country, this Court should grant the petition for writ of certiorari, for two reasons.

First, review is necessary to resolve important questions concerning the application of the *ad hoc* takings test under *Penn Central*. The California Court

of Appeal's decision in this case deepens the confusion over this test and in effect guts any protection it might otherwise afford against government abuse. This Court's current takings jurisprudence provides no definitive answers to resolve this confusion.

Second, review is necessary to provide guidance on the first prong of the *Williamson County* test: When has a property owner who wants to bring a regulatory takings claim obtained a final administrative decision? The court of appeal's decision—contrary to the language and logic of some of this Court's decisions—all but ensures that takings claimants will be barred from challenging Respondent's appellate land-use decisions.

ARGUMENT

I

REVIEW IS NECESSARY TO END THE PROFOUND CONFUSION THAT *PENN CENTRAL* HAS ENGENDERED

Penn Central is one of several tests used to determine whether a regulation effects a compensable taking. By most accounts, the *Penn Central* test is "the most important takings test"—both as a standard of broad applicability and as a source of substantial dispute. Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 Ariz. J. Int'l & Comp. L. 389, 397 (2007); Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 Envtl. L. 175, 203 (2004); Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1 (2003).

If government requires an owner to suffer a permanent physical invasion of property, a taking occurs. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). If a regulation deprives an owner of "all economically beneficial use" of his property, it effects a taking as well. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Both the *Loretto* and *Lucas* tests are relatively straightforward.

What if a regulation fits neither the *Loretto* nor the *Lucas* paradigm? While not requiring an owner to suffer a permanent physical invasion or depriving him of all economically beneficial use of his property, the regulation still may interfere with his property rights. For this scenario, the Court relies upon a third, catch-all test articulated in its 1978 decision in *Penn Central*, which requires a balancing of the following factors to determine whether a taking has occurred:

> (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."

Penn Central, 438 U.S. at 124 (citation omitted).

What do these factors mean, and how are they to be applied? Litigants, their counsel, and the courts—of all ideological persuasions—have been at a loss over the last thirty years fully to understand, let alone articulate, the circumstances under which these factors result in a taking. At one end of the ideological spectrum, noted pro-government litigator and scholar John Echeverria has opined that "*Penn Central* is . . . confusing" and based on "scattered reasoning."

John D. Echeverria, *From a "Darkling Plain" to What? The Regulatory Takings Issue in U.S. Law and Policy*, 30 Vt. L. Rev. 969, 971 (2006). In Echeverria's view, "[t]he so-called 'character' factor is the most confused and confusing feature of regulatory takings doctrine." John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, SK081 ALI-ABA 143 (June 9-10, 2005).

At the other end of the ideological spectrum, pro-property rights scholar Richard Epstein has characterized the *Penn Central* factors as "confused and mischievous." Richard Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 607 (2007). And property rights litigator and scholar Timothy Sandefur similarly has referred to *Penn Central*'s "confusing, multi-factor 'balancing' test." Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 Chap. L. Rev. 1, 32 (2006); *see also* J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After* Palazzolo*, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 Sw. U. L. Rev. 351, 352 (2005) ("[T]he meaning and significance of 'investment-backed expectations' is among the most baffling elements of this confusing and seemingly schizophrenic [regulatory takings] doctrine."); R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Envtl. L. J. 449, 449 (2001) ("Although more than two decades have elapsed since *Penn Central*, neither courts nor commentators have been able to agree on the meaning or applicability of investment-backed expectations in takings law.").

Now, as a result of the court of appeal's decision, there is even confusion about whether a landowner is entitled to present evidence on each of the *Penn Central* factors and prove his claim to a trier of fact. This Court in *Penn Central* said that the three-factor test involved "essentially ad hoc, factual inquiries" about the challenged regulation's nature and impact. *Penn Central*, 438 U.S. at 124. More recently, the Court reiterated the fact-intensive nature of the *Penn Central* inquiry, saying it had designed the test "to allow 'careful examination and weighing of all the relevant circumstances.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. at 636 (O'Connor, J., concurring)).

It makes sense for the *Penn Central* factors to be evaluated on the unique set of facts of each case. The first prong presumably requires proof of the economic value of the subject property, both before and after application of the challenged regulation. *See, e.g.*, *Walcek v. United States*, 44 Fed. Cl. 462, 466 (1999) (describing the intensively disputed factual nature of the inquiry). The second prong requires evidence of the landowner's "distinct investment-backed expectations" (however that term is defined). *Id.* At a minimum, the landowner needs to prove the extent of his investment "in reliance on the regulatory scheme in place at the time of the purchase" and "the extent to which the regulation of [his] property was foreseeable." *Id.* at 466-67 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006, 1013 (1984)). Finally, the third factor—the character of the governmental action—requires a factual investigation into the nature of the regulation's interference with the subject property: Does it produce a physical invasion of the

property? Or, does it simply "adjust[] the benefits and burdens of economic life to promote the common good"? *Penn Central*, 438 U.S. at 124.

However vague the factors might be, it is clear that *all three* factors must be weighed in light of the evidence presented to a trier of fact. Nevertheless, the California Court of Appeal saw it differently. It decided that Petitioner's *Penn Central* claim could not lie *as a matter of law*, because about 20% of its property still could be developed. *Charles A. Pratt Constr. Co., Inc.*, 162 Cal. App. 4th at 1081. The court of appeal denied Petitioner an opportunity to present evidence on the *Penn Central* factors for weighing by the trial court.

The appeals court also relied *exclusively* on the first factor—the economic impact of Respondent's regulation—without weighing (let alone considering) the other two factors. For example, take the third factor concerning the character of the government action. There was no evidence that Respondent's designation of more than 80% of Petitioner's parcel as environmentally sensitive habitat area was *in any way* "adjusting the benefits and burdens of economic life to promote the common good." Instead, Respondent in effect converted Petitioner's designated parcel into a public park—to be enjoyed by the community, entirely at Petitioner's expense—a result that violates this Court's admonition against "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This Court should take the opportunity to end the decades-old confusion surrounding the *Penn Central* test by clarifying that *Penn Central* claimants are to be

given the opportunity to offer evidence to the trier of fact on *all* of the *Penn Central* factors. *See* R. S. Radford, *Instead of a Doctrine:* Penn Central *As the Supreme Court's Retreat from the Rule of Law*, SM040 ALI-ABA 815 (Apr. 12-14, 2007) ("A number of courts, however, have treated the retention of residual value as dispositive in the government's favor, as if the claim had been brought under *Lucas* rather than *Penn Central*. Another pitfall is the tendency of some courts to merge deprivation of beneficial use with the investment-backed expectations inquiry, refusing to consider economic impacts attributable to the loss of uses which, in the court's opinion, the owner could not reasonably have expected to effectuate."); *id.* n.45 (citing *Putnam County Nat'l Bank v. City of New York*, 829 N.Y.S.2d 661, 663 (2007) ("The property owner bears a heavy burden of demonstrating by 'dollars and cents evidence' that under no permissible use would the parcel as a whole be capable of producing a reasonable return upon enforcement of the challenged regulation.")). Further, the Court should remind the lower courts that *Penn Central* sets forth a *balancing test*—i.e., a test that takes into account fully the regulation's injury to the property owner, as well as the government's interests.

II

REVIEW IS NECESSARY TO CLARIFY THE "FINAL AGENCY DECISION" PRONG OF *WILLIAMSON COUNTY*

In *Williamson County*, this Court considered whether a takings claim based on the economic impact of a land-use regulation was ripe. *Williamson County*, 473 U.S. at 174. The Court held that such a claim was

not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 193. The Court also held that a federal takings claim seeking compensation would not be ripe for review in federal court until the plaintiff unsuccessfully sought and was denied just compensation through state compensation procedures. *Id.* at 194, 197. The "final agency decision" prong of the *Williamson County* ripeness test is the prong at issue in this petition: What exactly constitutes a "final" decision?

This Court's subsequent decision in *Palazzolo* provides some clues. There, the Court rejected the notion that the takings claimant must know with absolute certainty all permissible uses for each and every last inch of the property. *Palazzolo*, 533 U.S. at 620. The Court held that a takings claim becomes ripe when the property owner has "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property." *Id.* As the Court explained:

> While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a ***reasonable degree of certainty***, a takings claim is likely to have ripened.

Id. (emphasis added).

Still, despite the Court's clarification, confusion about the "final agency decision" prong of *Williamson County* persists, as evidenced by the California appellate decision in this case.[2] Here, Petitioner was required to jump through the regulatory hoops of two government entities: the County of San Luis Obispo, which has primary land-use regulatory authority, and Respondent California Coastal Commission, which has only appellate jurisdiction over Petitioner's property. After having spent the better part of a decade with the County considering ten different alternative uses for its property, Petitioner finally obtained approval for one of the alternative uses. On appeal, Respondent reviewed *the entire record* of the County proceedings—including all ten of the alternative uses for Petitioner's property—and rejected the development permit: Respondent decided that over 80% of its property was environmentally sensitive habitat area and, therefore, undevelopable. No doubt or dispute exists about the permissible uses for 80% of the land—i.e., that portion of Petitioner's property affected by Respondent's designation: *Nothing at all can be done with that portion of the property. Charles A. Pratt Constr. Co., Inc.*, 162 Cal. App. 4th at 1077.

Nevertheless, the California Court of Appeal held that Respondent had not ripened its claim. Shifting its

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[2] Like *Penn Central*, *Williamson County*'s ripeness test has proved to be an unworkable judicial doctrine, proved by the numerous petitions for writ of certiorari the doctrine has inspired. *See, e.g.*, *Braun v. Ann Arbor Charter Twp.*, ___ S. Ct. ___, 2008 WL 3976943 (Dec. 1, 2008); *Peters v. Village of Clifton, Ill.*, 128 S. Ct. 1472 (2008); *SFW Arecibo, Ltd. v. Rodriguez*, 546 U.S. 1075 (2005).

focus from the 80% of the property that was indisputably undevelopable—and upon which Petitioner based its takings claim—the court of appeal seized on the fact that the remaining 20% *was* developable: "Assuming Pratt's claim is true, that leaves 20 percent of the 121-acre tract, over 24 acres, available for development." *Id* at 1081. In the court's mind, the lack of certainty as to how that 20% could be developed rendered Petitioner's claim unripe for the lack of finality of Respondent's decision.

The appeals courts' ripeness holding—binding on the trial courts of California—conflicts with this Court's decisions. The "final agency decision" prong of *Williamson County* demands reasonably certain finality *on the issue that inflicts an actual, concrete injury*. Here, Respondent's declaration that over 80% of Petitioner's property was environmentally sensitive habitat area and therefore undevelopable was the issue inflicting an actual, concrete injury. With no dispute about how that 80% could be developed—it could not be developed *at all*—the claim was ripe under *Williamson County*.

The implications of the court of appeal's published decision are significant. It endorses form over substance, and risks making long, drawn-out, and ultimately fruitless land-use negotiations the norm (because they are immune from challenge). This is especially the case with respect to Respondent and other government entities like it, which enjoy only *appellate jurisdiction* over development projects. In this case, for example, there is no guarantee that Petitioner ever will be before Respondent with an alternative project, as the court of appeal suggested. Cal. Pub. Res. Code § 30603(a) (Respondent obtains

appellant jurisdiction over local project only if appealed by project opponent). The Court's review is necessary to provide guidance on this issue to all the lower courts, including the California Court of Appeal, and to ensure property owners are not made subject to an unforgiving and rigid rule of ripeness.

CONCLUSION

The Court has an opportunity with this petition to address two of the most vexing doctrines in its takings jurisprudence: *Penn Central* and *Williamson County*. These doctrines come up time and again, but there is little guidance from this Court as to how to apply them. The Court should grant the petition for writ of certiorari.

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